IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE STEAMBOAT EUGENE.
GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees.
JOEL P. GEER, *Claimant and Appellant.*
WALTER M. CARY, FRED M. LYONS, and EDWARD J. KNIGHT, named in the decree as intervenors, *Appellees.*

Brief for Appellant.

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Appellant.

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET.
1898.

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STATEMENT OF THE CASE.

This appeal is taken by Joel P. Geer, claimant of the steamboat Eugene, from the decree of the United States District Court for the District of Washington, Northern Division, against said steamboat, in favor of libellants and of Walter M. Cary, Fred M. Lyons and Edward J. Knight, named in the decree as intervenors, each in the principal sum of $800.00, aggregating $4,000.00, and directing that a writ of venditioni exponas issue against said vessel, to enforce such decree.

The proceeding is one in rem, brought by libellants to recover damages for breach of an alleged contract for the carriage of said persons from Seattle, Washington, to Dawson City, N. W. T., upon a continuous voyage alleged as agreed to be undertaken by a steamship known as the Bristol and the said steamboat Eugene, which voyage, it was alleged, was abandoned by the Eugene when on the high seas.

To said original libel claimant filed exceptions, which were sustained by the court; whereupon, upon leave granted therefor, libellants filed an amended libel, which in substance alleged:

That the Eugene was owned and operated by a corporation named the Portland & Alaska Trading & Transportation Company, which was a common carrier of passengers, baggage and freight between Seattle and Dawson City; that one E. B. McFarland was general manager and one C. W. Gould agent of said corporation and of said steamboat, and that at the time said corporation operated a steamboat known as the Bristol.

That on August 11, 1897, the steamboat Eugene caused it to be advertised that said vessel, in tow of the steamship Bristol, would leave for Dawson City on August 23, 1897, carrying passengers, baggage and freight, and would reach Dawson City by September 15, 1897; that, relying upon the good faith of said advertisements and oral representations, libellants entered into a contract with the Eugene, wherein and whereby the Eugene undertook and agreed to carry them from Seattle to Dawson City via St. Michael's, Alaska, and that it would leave Seattle on August 24, in tow of the steamship Bristol, and would be

towed by the Bristol from Seattle to St. Michael's, from which place the Eugene would continue said voyage alone up the Yukon river to Dawson City, and would reach that point on September 15th; and that, in consideration of said promises, libellants each engaged passage from Seattle to Dawson City, and paid therefor $300.00 each for the conveyance of themselves and 1,500 pounds of baggage, and received tickets therefor.

That libellants performed all the conditions of their contract; and that on the 24th day of August, 1897, the Eugene entered upon the performance of her contract, and left Seattle in tow of said steamship Bristol, and undertook to carry libellants and other passengers on the whole of said voyage, and proceeded on the high seas for six hundred miles to the coast of Alaska, where she abandoned the voyage and refused to proceed further, and libellants were landed at Victoria.

That libellants each purchased an outfit at an expense of $200.00, and lost time in which they were hindered from carrying on their business, all to the damage of each of them in the sum of $1,000.00.

To said amended libel claimant answered, denying the various articles of said amended libel and setting up a further defense, as follows:

That prior to the 31st day of July, 1897, Francis B. Jones and Joel P. Geer, being part owners of the steamship Eugene, then belonging to the port of Portland, state and district of Oregon, entered into a contract and agreement with the Portland & Alaska Trading & Transportation Company, in words as follows, to wit:

"This agreement, made this 31st day of July, 1897, by "and between Francis B. Jones and Joel P. Geer, of the "City of Portland, Multnomah county, Oregon, and the "Portland & Alaska Trading & Transportation Company, "of the same place, witnesseth:

"That whereas, the said Francis B. Jones and Joel P. "Geer are desirous of placing the steamer Eugene, now "plying as a passenger boat upon the Willamette river, "upon the Yukon river, in the Territory of Alaska and the "Northwest Territory of Great Britain, adjoining thereto, "for the purpose of running the said boat upon the said "river.

"And whereas, the Portland & Alaska Trading & Trans-"portation Company are desirous of using the said "boat for the purpose of transporting freight up the "Yukon river to Circle City or Dawson.

"Now, therefore, in consideration of the premises, and "the further consideration of one dollar in hand paid the "said Francis B. Jones and Joel P. Geer have, and do "hereby agree to and with the said Portland & Alaska "Trading & Transportation Company, to turn over the "possession of the said steamer Eugene to the said Port-"land & Alaska Trading & Transportation Company for "the purposes aforesaid of taking the same to and up the "Yukon river to such point of the same as the said Port-"land & Alaska Trading & Transportation Company may "desire, and when the said steamer Eugene has arrived at "the terminal point decided upon by the said Portland & "Alaska Trading & Transportation Company, upon the "said river Yukon, and hath discharged her cargo within "a reasonable time and under existing conditions, the said

"Portland & Alaska Trading & Transportation Company "shall turn over the said steamer to the Willamette & "Columbia River Towing Company and Joel P. Geer, and "to there enter a joint traffic interchange between Port- "land, Or., and Dawson City, Alaska, for the ensuing year, "on a basis of 40 per cent. to the steamer Eugene and 60 "per cent. to the Portland & Alaska Trading & Transpor- "tation Company, of through rates, details of which to be "entered into before sailing from Portland, without "charge, cost or expense to them. But it is expressly un- "derstood that the said Portland & Alaska Trading & "Transportation Company do not hereby agree to transfer "said steamer safely to the said Yukon, but only to make "the endeavor to do so, using all proper precaution and "care in said effort. But if said steamer Eugene shall "fail to reach the Yukon river or said point of destination "by reason of any infirmity in the character of the steam- "er, but without negligence upon the part of the agents "of the said Portland & Alaska Trading & Transporta- "tion Company, the latter shall not be responsible in any "way for the loss of the said steamer or its failure to "arrive at the proposed terminal destination.

"And the said Portland & Alaska Trading & Transpor- "tation Company, in consideration of the premises, and "that the said Francis B. Jones and Joel P. Geer have put "the said steamer Eugene into their possession for the "aforesaid purposes, hath and do hereby agree to put the "said boat, at their own proper cost, charge and expense, "into such condition as will render it, as far as practica- "ble, seaworthy and safe to proceed upon the high seas "to the said Yukon river. The said repairs and renew-

"als necessary to be made to and upon the said steamer "Eugene to be done at once, and to be satisfactory to the "said Francis B. Jones and Joel P. Geer before the said "steamer leaves the City of Portland.

"In testimony whereof, the said Francis B. Jones and "Joel P. Geer and the Portland & Alaska Trading & "Transportation Company, by its president, have hereunto "set their hands and seals, and the seal of the said com-"pany.

"F. B. JONES.
"JOEL P. GEER.
"H. P. McGUIRE,
"For the Portland & Alaska Trading & Transportation "Company."

That thereafter, and on the 7th day of August, 1897, the Willamette & Columbia River Towing Company and said Joel P. Geer, the then owners of said steamship Eugene, then lying in the port of Portland, Oregon, and said respondent, the Portland & Alaska Trading & Transportation Company, entered into a contract relative to said steamship Eugene in words as follows, to wit:

"This agreement, made this 7th day of August, 1897, by "and between Willamette & Columbia River Towing "Company, a corporation, and Joel P. Geer, of the City of "Portland, Oregon, and the Portland & Alaska Trading & "Transportation Company, of the same place, witnesseth:

"That whereas, the said Willamette & Columbia River "Towing Company and Joel P. Geer are desirous of plac-"ing the steamer Eugene, now plying as a passenger boat "upon the Willamette river, upon the Yukon river, in the "Territory of Alaska and the Northwest Territory of

"Great Britain, adjoining thereto, for the purpose of run-
"ning the said boat upon the said river.

"And whereas, the Portland & Alaska Trading & Trans-
"portation Company are desirous of using the said boat
"for the purpose of transporting freight up the Yukon
"river to Circle City or Dawson City, Northwest Terri-
"tory.

"Now therefore, in consideration of the premises, and
"of the repairs, improvements and money expended by
"the Portland & Alaska Trading & Transportation Com
"pany upon the said steamer Eugene in preparing the
"said steamer for the sea voyage from Portland to St
"Michael's, Alaska, and the further consideration of one
"dollar in hand paid, the said Willamette & Columbia
"River Towing Company and Joel P. Geer have, and do
"hereby agree to and with the said Portland & Alaska
"Trading & Transportation Company, to turn over and do
"hereby turn over the possession of the said steamer
"Eugene to the said Portland & Alaska Trading & Trans-
"portation Company for the purposes aforesaid of taking
"the same to and up the Yukon river to such point of the
"same as the said Portland & Alaska Trading & Trans-
"portation Company may desire, and when the said
"steamer Eugene has arrived at the terminal point decided
"upon by the said Portland & Alaska Trading & Trans-
"portation Company, upon the said river Yukon, and hath
"discharged her cargo, the said Portland & Alaska Trad-
"ing & Transportation Company shall turn over to the
"said Willamette & Columbia River Towing Company
"and Joel P. Geer, without expense to them, so far as
"transporting said steamer Eugene to said Dawson City,

"Alaska. But it is expressly understood that the said "Portland & Alaska Trading & Transportation Company "do not hereby agree to transfer said steamer safely to "the said Yukon, but only to make the endeavor so to do, "using all proper precaution and care in said effort. But "if the said steamer Eugene shall fail to reach the Yukon "river or said point of destination by reason of any infirm- "ity in the character of the steamer, but without negli- "gence upon the part of the agents of the said Portland & "Alaska Trading & Transportation Company, the latter "shall not be responsible in any way for the loss of the "said steamer or its failure to arrive at the proposed ter- "minal destination.

"And the said Portland & Alaska Trading & Transpor- "tation Company, in consideration of the premises and "that the said Willamette & Columbia River Towing Com- "pany and Joel P. Geer have put the said steamer Eugene "into their possession for the aforesaid purposes, hath and "do hereby agree to put the said boat, at their own proper "cost, charge and expense, into such condition as will ren- "der it, as far as practicable, seaworthy and safe to pro- "ceed upon the high seas to the said Yukon river. In "consideration of the money expended by the said Port- "land & Alaska Trading & Transportation Company in "the preparation, repairing and improvement of the said "steamer Eugene at the City of Portland, Oregon, so as "to make her seaworthy, the Willamette & Columbia "River Towing Company and Joel P. Geer hereby enter "into an agreement with and hereby bind themselves to "give the passengers and freight offered them by the said "Portland & Alaska Trading & Transportation Company

" at St. Michael's, or any other point agreed upon by them " at or near the mouth of the said Yukon river, the prefer- " ence of all other passengers and freight, and hereby enter " into a joint traffic agreement, for the term of one year " from the time said steamer Eugene reaches Dawson " City, with the Portland & Alaska Trading & Transpor- " tation Company, for the interchange of passengers and " freight between Portland, Oregon, and Dawson City, " Northwest Territory, and other points upon the Yukon " river reached by said steamer Eugene, upon the basis of " forty (40) per cent. of the gross receipts received from all " interchangeable passengers and freight to Willamette " & Columbia River Towing Company and Joel P. Geer, " and sixty (60) per cent. of said gross receipts to the Port- " land & Alaska Trading & Transportation Company. The " feeding and revenue derived from the passengers and " the expenses of providing for them upon said steamer " Eugene is not to be included herein.

" In testimony whereof, the said Willamette & Columbia " River Towing Company and Joel P. Geer, and the Port- " land & Alaska Trading & Transportation Company, by " its president, have hereunto set their hands and seals, " and the seal of the said company.

" WILLAMETTE & COLUMBIA R. & T. Co., [Seal.]
" By F. B. JONES, President. [Seal.]
" WILLAMETTE & COLUMBIA RIVER TOWING
" COMPANY, by JOEL P. GEER. [Seal.]
" M. S. JONES, Secretary.
" PORTLAND & ALASKA TRADING & TRANSPOR-
" TATION COMPANY, by W. W. McGUIRE,
" Secretary.

"[Seal.] Seal of Portland & Alaska Trading & Trans-
"portation Company.

"[Seal.] Seal of Willamette & Columbia River Tow-
"ing Company.

"In the presence of:

"ALEXANDER SWEEK.

"E. B. McFARLAND."

That in pursuance of said contracts and in conformity therewith, said owners of said steamship Eugene turned the possession of her over unto the said Portland & Alaska Trading & Transportation Company for the purposes thereof, and not otherwise, and said Portland & Alaska Trading & Transportation Company proceeded to refit said steamer Eugene in accordance with the provisions of said contracts.

That the said Eugene was not an ocean-going vessel, but a light-draught river steamboat then plying upon the waters of the Willamette river, in the State of Oregon, and was well known as such both at Portland and Seattle; and that her use upon the seas or any use as carrier of freight, passengers or baggage was never contemplated between her owners and the said Portland & Alaska Trading & Transportation Company; that the delivery of said steamboat Eugene by her said owners to said Portland & Alaska Trading & Transportation Company, of Portland, Oregon, was in accordance with said contracts and not otherwise, and for the purpose of fitting up said vessel and taking the same from Portland, Oregon, to St. Michael's, Alaska, between which said latter point and Dawson City the owners of the Eugene and said Portland & Alaska Trading & Transportation Company desired and agreed to operate

said boat; that thereafter, and before the departure of said boat from Portland, Oregon, the Yukon Transportation Company, of Portland, Oregon, a corporation organized and existing under the laws of the State of Oregon, became, by purchase from said Willamette & Columbia River Towing Company and said Joel P. Geer, the owner of said steamship Eugene, and is the owner thereof; and that claimant was master and bailee thereof on behalf of said owners.

That thereafter said steamboat Eugene, by her own power, proceeded from Portland to Astoria, Oregon, and from said latter point was towed by the tugboat Escort to Port Angeles, Washington, and from said last named point proceeded with her own power to Comox, British Columbia, and at or about said last named point was taken in tow by the steamship Bristol, such towage being for the purposes mentioned in the said contracts of July 31, 1897, and August 7, 1897, and not otherwise; that when said steamboat Eugene had proceeded as aforesaid a distance of 600 or 700 miles from Comox, British Columbia, heavy weather was encountered, and said steamboat Eugene began to strain heavily and spring leaks, and was compelled to and did return to Port Townsend, Washington, and thence proceeded to Seattle, Washington, for repairs, at which said latter point she was lying at the time of her attachment at the instance of libellants; that the libellants purchased from F. C. Davidge & Co., at Seattle, Washington, passage upon the steamship Bristol from Victoria, B. C., to St. Michael's, Alaska, thence operated by F. C. Davidge & Co. under time charter, and thereafter embarked upon said steamship Bristol, together with their freight and baggage, and at the same time purchased from the Port-

land & Alaska Trading & Transportation Company a ticket from St. Michael's, Alaska, to Dawson City, N. W. T., which this claimant was informed and believes, and therefore alleged, read as follows:

"No. 6.

"Portland & Alaska Trading & Transportation Co.

"Good for one passage from St. Michael's to Dawson "City, N. W. T., via S. S. Eugene. Name, Gaston Jacobi "(Charles Ruff). E. B. McFARLAND, Manager."

That neither of said libellants, nor their baggage or freight, was ever on board the steamer Eugene; that the voyage of said vessel contemplated under said contract evidenced by said ticket was to begin at St. Michael's, Alaska, and end at Dawson City, N. W. T.; that neither of said libellants nor said steamboat Eugene ever arrived at St. Michael's, and that said contract was wholly executory.

That by reason of the fact that the steamboat Eugene was not a seagoing vessel, and was commonly and generally known as such, neither said Portland & Alaska Trading & Transportation Company, nor the owners of said steamboat Eugene, nor claimant, ever promised or agreed that said vessel could in fact undergo the trip to St. Michael's and there place herself in readiness to proceed up the Yukon river, and from St. Michael's to Dawson City; that no absolute representations or warranty that she would arrive at St. Michael's on or before September 15, 1897, or at any other time, were made by said Portland & Alaska Trading & Transportation Company to libellants, but only that an attempt would be made to bring her to said point; and that said attempt was so made, and by stress of

weather said boat was unable to proceed to St. Michael's and was obliged to abandon the attempt and return to Port Townsend.

That libellants, prior to the institution of this suit, released said steamer Bristol and said F. C. Davidge & Co. from their contract with libellants for the conveyance of libellants from Victoria to St. Michael's; that the conveyance of libellants contemplated under said ticket on the steamboat Eugene was from St. Michael's to Dawson City, and not otherwise; that neither of the said libellants, nor said steamer Eugene, ever arrived at the port of St. Michael's, at which point said voyage was to commence; and that no part of the passage money alleged as paid was ever paid to or received by the Yukon Transportation Company, of Portland, Oregon, owner of the Eugene, or claimant, as her manager.

And claimant prayed that said libel be dismissed.

Thereafter, Walter M. Cary, Fred M. Lyons and Edward J. Knight served upon claimant's proctors a paper purporting to be a copy of a libel of intervention, filed in said court by said persons, claiming the same relief upon the same alleged state of facts against the Eugene. *No such libel of intervention, nor any stipulation of costs, was ever filed in the district court.*

Testimony was taken before a commissioner, and the decree appealed from was thereafter rendered by the district court in favor of libellants and said alleged intervenors, each in the principal sum of $800.00.

The facts disclosed by the evidence are substantially as set forth in the answer of the claimant to the amended

libel. The Eugene was placed by her owner in the possession of the Portland & Alaska Trading & Transportation Company for the purposes of the contracts above set forth, and the only interest that corporation had in the steamboat was such special interest as it acquired under these contracts. Arrangements were made between the Portland & Alaska Trading & Transportation Company and F. C. Davidge & Co., who operated the British steamship Bristol, under a time charter, to carry not less than one hundred and fifty nor more than two hundred people from Seattle to St. Michael's, at one hundred dollars each, and that the Bristol should act as convoy for the Eugene from Comox to St. Michael's; the Eugene to be under her own power, and subject to the orders of the master of the Bristol, as to course, etc. For this service Davidge & Co. were to receive $200 per day.

H. P. McGuire, for the Alaska Company, and Davidge, then went to Seattle and opened a joint office, in charge of C. W. Gould, and libellants there paid to Mr. Gould three hundred dollars each, for which they each received a ticket from Seattle to Victoria on the steamboat City of Kingston, an order on Davidge & Co., Victoria, for a ticket on the Bristol from Victoria to St. Michael's (exchanged at Victoria for the ticket good on the Bristol), and a ticket good on the Eugene from St. Michael's to Dawson City, which read:

"Portland & Alaska Trading & Transportation Com-
"pany.

"Good for one passage from St. Michael's to Dawson
"City, N. W. T., via S. S. Eugene. (Name of passenger.)

"E. B. McFARLAND, Manager."

Neither the Eugene nor the Bristol was then in Seattle, the Eugene being at Port Angeles, Washington, and the Bristol on her way from Alaska to Victoria. Libellants and the other Seattle passengers, on different days, delivered their outfits to the wharfinger at the dock which was the landing place of the City of Kingston at Seattle, marking them, for identification, "S. S. Eugene," and embarked on the City of Kingston for Victoria. After a delay of two or three days at Victoria, awaiting the arrival of the Bristol, they embarked on the Bristol, which thereupon started, and when a short distance out was met by the Eugene, which had steamed over from Port Townsend. A line was passed from the Bristol to the Eugene, and the two vessels proceeded to Comox, the coaling port of the Bristol, the Eugene being under her own power. At Comox, while the Bristol was coaling, the baggage of the *crew of the Eugene*, for safety, was placed on board the Bristol; and the revenue authorities threatening to seize the Eugene on this account, the Eugene herself proceeded to sea, and, after proceeding about forty miles, was overtaken by the Bristol, and a line was again passed to the Eugene. The two vessels then proceeded together through Queen Charlotte's Sound; and then, in the face of a summer storm, the Bristol towed the Eugene into the open sea, refusing to proceed by the inside passage, being without a pilot for that route. The storm increased, and the truss on the Eugene began to strain and work. The strain upon other parts of the vessel was apparent, and she was taking in water through her seams. Captain Lewis, of the Eugene, at the solicitation of her crew, signalled the Bristol to put back into Alert bay. This was

done, and while there the Eugene was surveyed by a committee and pronounced unfit in her condition to proceed to St. Michael's. The passengers, including libellants, thereupon insisted upon returning to Victoria, and released the Bristol from its obligation to carry them to St. Michael's. The Eugene proceeded to Seattle, and while undergoing repairs was arrested at the suit of libellants. *Neither libellants nor their outfits were ever on board the Eugene as passengers or freight. The Eugene was not in Seattle when libellants purchased their tickets, and was never in Seattle at all until after the expedition was broken up and she went there for repairs.*

ASSIGNMENT OF ERRORS.

It is alleged and intended to be urged upon this appeal that the decree of the district court is erroneous in the following particulars:

1. In decreeing any damages to libellants or any of them by reason of the matters disclosed in the pleadings or proofs.

2. In holding that libellants or any of them contracted with the Eugene for a continuous voyage from Seattle to Dawson City.

3. In holding that the Eugene had entered upon the performanace of such continuous voyage.

4. In holding that an action in rem lay against the Eugene by reason of the matters pleaded or proved.

5. In not holding that the Portland & Alaska Trading & Transportation Company was owner only for the purpose of contracting for the carriage of passengers or freight upon the Yukon river, and had no right or power to bind the Eugene further than to contract for a voyage

up the Yukon river, and this only in the event of the safe arrival of the Eugene at St. Michael's.

6. In not holding that any contract on the part of the Eugene was executory only.

7. In decreeing excessive damages, $400 of the award in each instance being for loss of time and expected profits, the same being too remote and speculative to furnish any basis for a recovery.

8. In not holding that the return of the Eugene was under circumstances such as to discharge her from obligation or liability to libellants.

9. In not holding that any contract on the part of the Eugene was executory, and that said vessel had not entered upon the performance thereof.

10. In not holding that libellants contracted with the Portland & Alaska Trading & Transportation Company, relying upon its personal credit, and not upon the credit of the Eugene.

11. In decreeing for said alleged intervenors, Cary, Lyons and Knight, for all and singular the above errors specified.

12. That said district court had no jurisdiction to render such decree as to said alleged intervenors.

13. In decreeing that any stipulation filed by claimant authorizes said or any such decree.

ARGUMENT.

The propositions of law and fact for which we shall contend are:

1. That the Portland & Alaska Trading & Transportation Company, with whom alone libellants dealt, had not

power to bind the Eugene in specie by any such contract as is alleged was made.

2. That libellants contracted for a voyage on the Eugene from St. Michael's to Dawson City only, such voyage to begin at St. Michael's and to end at Dawson City; and that as neither the Eugene nor libellants reached St. Michael's, and no part of the outfit of libellants was received on board the Eugene, such contract was executory only, and was insufficient to sustain a proceeding in rem against the Eugene, she having never entered upon the performance of such contract.

3. That the circumstances under which the Eugene abandoned the voyage were such as to discharge her from any liability which she might otherwise have incurred.

4. That the contract was entered into by libellants with the Portland & Alaska Trading & Transportation Company, in reliance upon the personal credit and responsibility of that corporation, and not upon the faith or credit of the Eugene; and that inasmuch as the Eugene was not at Seattle until about the time of the filing of the libel itself, and no dealings were ever had between libellants and the owner of the Eugene, or her master as representative of her owner, no basis for a suit in rem existed.

6. That excessive damages were awarded to libellants.

7. As to the alleged intervenors, Cary, Lyons and Knight, in addition to all the foregoing points, we shall urge that the district court had no jurisdiction to render its decree as to such alleged intervenors, and that the same is a nullity.

8. The stipulation referred to in the decree does not authorize any decree in favor of said alleged intervenors.

These points we shall discuss in the order named above.

I.

The owner of the Eugene at the time of the dealings had between libellants and the Portland & Alaska Trading & Transportation Company was the Yukon Transportation Company, of Portland, Oregon, and neither this corporation nor the former owners of the vessel, Jones and Geer, ever had any dealings with libellants or received any part of the passage money. Whether the Portland & Alaska Trading & Transportation Company had any such special ownership as would authorize it to bind the vessel by a contract with libellant, can only be ascertained by an interpretation of the contracts under which alone the Portland & Alaska Trading & Transportation Company held the vessel. These contracts are set forth in full on pages 4 and 7 of this brief, and also in the answer to the amended libel (Record, page 86). The first contract contains the following recitals and agreements:

"Whereas, the said Francis B. Jones and Joel P. Geer "are desirous of placing the steamer Eugene, now plying "as a passenger boat upon the Willamette river, upon "the Yukon river, in the Territory of Alaska and the "Northwest Territory of Great Britain, adjoining thereto, "for the purpose of running the said boat upon the said "river; and whereas, *the Portland & Alaska Trading & "Transportation Company are desirous of using the said "boat for the purpose of transporting freight up the "Yukon river to Circle City or Dawson.* Now therefore, "in consideration of the premises, and the further con- "sideration of one dollar in hand paid, the said Francis B. "Jones and Joel P. Geer have and do hereby agree to and "with the said Portland & Alaska Trading & Transporta-

"tion Company to turn over the possession of the said "steamer Eugene to the said Portland & Alaska Trading "& Transportation Company, for the purposes aforesaid "of taking the same to and up the Yukon river to such "point of the same as the said Portland & Alaska Trading "& Transportation Company may desire, and when the "said steamer Eugene has arrived at the terminal point "decided upon by the said Portland & Alaska Trading & "Transportation Company, upon the said river Yukon, and "hath discharged her cargo within a reasonable time "under existing conditions, the said Portland & Alaska "Trading & Transportation Company shall turn over the "said steamer to the Willamette & Columbia River Tow-"ing Company and Joel P. Geer, and to there enter a "joint interchange of traffic between Portland, Or.," etc.

The provisions of the contract of August 7, 1897, are substantially the same in the above particulars.

The only interest of the Portland & Alaska Trading & Transportation Company in the Eugene was its interest under these contracts; and its possession of the boat was the possession under these contracts, and not otherwise, and was subject to the limitations of the contracts. Captain ~~Jones~~ Geer, one of the former owners, and ~~president~~ manager of the Yukon Transportation Company, the then owner, states in answer to an interrogatory (Transcript, p. 309; Record, p. 259): "They were not to use the boat from Port-"land to St. Michael's for any purpose. She was put into "their possession at Portland for the purpose of fitting "her up and taking her up to St. Michael's, where they "were to have the use of the boat from St. Michael's to "Dawson City, and for having the use of the boat from "St. Michael's to Dawson City they were to go to the

"expense of fitting her up for a sea voyage and taking "her to St. Michael's free of all costs as far as they were "concerned."

Captain Geer, claimant, and one of the former owners, testifies (Transcript, p. 280; Record, p. 236): "The boat was "not to be used on the open sea—never had passengers or "freight on board." And, as Captain Jones (Transcript, p. 379; Record, p. 292) testifies: "In the first place, the "McGuires (the Portland & Alaska Trading & Transpor- "tation Company) were to tow her (the Eugene) with a "tug." The Eugene was not in Seattle when the libellants purchased their tickets, and in the purchase they dealt neither with her owner nor her master.

We admit that, where a charter-party amounts to a demise of the vessel, contracts of affreightment or for the carriage of passengers upon the performance of which the vessel enters, and claims for supplies actually furnished in a foreign port, bind the vessel; but in the one case it is the entry upon performance, and in the other the use of the supplies, which creates the lien. In this case, however, libellants did not deal with the vessel, which was then hundreds of miles away, but with the Portland & Alaska Trading & Transportation Company, *having satisfied themselves upon inquiries that the corporation with which they were dealing was a business concern of responsibility, upon which they might rely.* Jacobi (Transcript, p. 159; Record, p. 137) says that Kleine & Rosenberg, the outfitters in Seattle, told him that the Portland & Alaska Trading & Transportation Company was all right, and Ruff testifies (Transcript, p. ; Record, p. 161) that Thedinga & Co. told him that the Portland & Alaska Trading

& Transportation Company were business people and would do things in a business way.

Under these circumstances, we submit that the Eugene could be held by libellants only to contracts which the Portland & Alaska Trading & Transportation Company might lawfully make with reference to her, under the contracts by virtue of which it had possession of the vessel; and, further, that the Eugene must have entered upon the performance of the contract so lawfully made.

Libellants were not dealing with the vessel itself through the apparent owner, but were contracting with the Portland & Alaska Trading & Transportation Company on the faith of the credit and responsibility of that corporation, in reference to a vessel which they never saw, and which was hundreds of miles away from the place in which the contract was entered into. They were dealing neither with the owner nor the master of the Eugene, and no part of their passage-money was going to that vessel.

The language of Mr. Justice Brown in the case of The T. A. Goddard, 12 Fed. Rep. 174, 181, we consider particularly applicable to this case. On page 181 he says: "The "libellants, having no direct agreement with the master of "the T. A. Goddard, are doubtless limited in their recov- "ery by the lawful terms of the contract between Russell "& Co. (the charterers) and the bark."

The evidence in this case is clear and undisputed that the Portland & Alaska Trading & Transportation Company had no right to use the Eugene for the purpose of carrying freight upon the high seas, or to contract for the carriage of any freight or passengers upon her, except for a trip up the Yukon river, beginning at St. Michael's and

ending at Dawson City. Hence the Eugene could not be bound by any contract for a voyage from Seattle to Dawson City entered into between the Portland & Alaska Trading & Transportation Company and libellants, she herself not being at Seattle, and libellants having contracted with the Portland & Alaska Trading & Transportation Company upon the personal credit of that corporation.

II.

The contract as to the Eugene was an executory one, and as neither that vessel nor libellants ever arrived at St. Michael's, the port at which the Eugene was to receive on board the passengers and freight for her trip up the Yukon river, and no part of the outfit of libellants was ever received on board the Eugene, no action in rem lies against the vessel, she herself never having entered upon the performance of the contract.

The Schooner Freeman v. Buckingham, 18 How. 188.
Vandewater v. Mills, 19 How. 82.
The Lady Franklin, 8 Wallace, 325.
The Keokuk, 9 Wallace, 517.
Scott v. The Ira Chaffee, 2 Fed. Rep. 401.
The General Sheridan, 2 Benedict, 299.
The Monte A., 12 Fed. Rep. 331.
The Eugene, 83 Fed. Rep. 222.

The opinion of Justice Greer, in the case of Vandewater v. Mills, 19 Howard, 82, clearly defines the limitations of maritime liens for the carriage of freight or passengers. It is there held that "maritime liens are stricti juris, and " will not be extended by construction. Contracts for the " future employment of a vessel do not, by the maritime " law, hypothecate the vessel. The obligation between

"ship and cargo is mutual and reciprocal, and does not "take place till the cargo is on board." In that case, the owners of two vessels entered into an agreement for the establishment of a through line from New York to San Francisco, via the isthmus of Panama, one of the vessels to run from New York to Aspinwall, and the other from Panama to San Francisco, the freight and passenger money to be pro-rated; and it was agreed that the vessels should leave San Francisco and New York at a certain time. The steamer Yankee Blade was libelled for breach of the contract, and exceptions were interposed by her owner on the ground that no proceding in rem lay against her. Justice Greer, on page 89, says:

"The circuit court dismissed the libel, being of opinion "'that the instrument is of a description unknown to the "'maritime law; that it contains no express hypothecation "'of the vessel, and the law does not imply one.'

"In support of his allegation of error in this decree, the "learned counsel for the appellant has endeavored to "establish the following proposition:

"'Agreements for carrying passengers are maritime "'contracts, pertaining exclusively to the business of com-"'merce and navigation, and consequently may be "'enforced specifically against the vessel by courts of "'admiralty proceeding in rem.'

"Assuming, for the present, the premises of this propo-"sition to be true, let us inquire whether the conclusion is "a legitimate consequence therefrom.

"The maritime 'privilege' or lien is adopted from the "civil law, and imports a tacit hypothecation of the sub-"ject of it. It is a 'jus in re,' without actual possession

" or any right of possession. It accompanies the property " into the hands of a bona fide purchaser. It can be exe- " cuted and divested only by a proceeding in rem. This " sort of proceeding against personal property is unknown " to the common law, and is peculiar to the process of " courts of admiralty. The foreign and other attachments " of property in the state courts, though by analogy loosely " termed proceedings in rem, are evidently not within the " category. But this privilege or lien, though adhering to " the vessel, is a secret one; it may operate to the prejudice " of general creditors and purchasers without notice; it is " therefore '*strieti juris*,' and cannot be extended by con- " struction, analogy or inference. 'Analogy,' says Par- " dessus (Droit Civ., Vol. 3, 597), 'cannot afford a decisive " ' argument, because privileges are of strict right. They " ' are an exception to the rule by which all creditors have " ' equal rights in the property of their debtor, and an " ' exception should be declared and described in express " ' words; we cannot arrive at it by reasoning from one " ' case to another.'

" These principles will be found stated, and fully vindi- " cated by authority, in the cases of The Young Mechanic, " 2 Curtis, 404, and the Kiersarge, ibid, 421; see also Har- " mer v. Bell, 22 E. L. & E. 62.

" *Now, it is a doctrine not to be found in any treatise on* " *maritime law, that every contract by the owner or master* " *of a vessel, for the future employment of it, hypothecates* " *the vessel for its performance.* This lien or privilege is " founded on the rule of maritime law as stated by Cleirac " (597), 'Le batel est oblige a la marchandise et la mar- " ' chandise au batel.' The obligation is mutual and recip- " rocal. The merchandise is bound or hypothecated to the

"vessel for freight and charges (unless released by the "covenants of the charter party), and the vessel to the "cargo. The bill of lading usually sets forth the terms of "the contract, and shows the duty assumed by the vessel. "Where there is a charter-party, its covenants will define "the duties imposed on the ship. Hence it is said (1 "Valin, Ordon. de Mar., B. 3, Tit. 1, Art. 11), that 'the ship, "'with her tackle, the freight, and the cargo, are respect-"'ively bound (affectee) by the covenants of the charter-"'party.' But this duty of the vessel, to the performance "of which the law binds her by hypothecation, is to deliver "the cargo at the time and place stipulated in the bill of "lading or charter-party, without injury or deterioration. "If the cargo be not placed on board, it is not bound to "the vessel, and the vessel cannot be in default for the "non-delivery, in good order, of goods never received on "board. *Consequently, if the owner or master refuses "to perform his contract, or for any other reason the ship "does not receive cargo and depart on her voyage accord-"ing to the contract, the charterer has no privilege or "maritime lien on the ship for such breach of contract by "the owners, but must resort to his personal action for "damages, as in other cases.*"

And on page 91:

"We have examined this case from this point of view, "because the libel seems to take it for granted that every "breach of contract where the subject-matter is a ship "employed in navigating the ocean gives a privilege or "lien on the vessel for the damages consequent thereon, "and because it was assumed in the argument that, if this "contract was in the nature of a charter-party, or had "some features of a charter-party, the court would extend

"the maritime lien by analogy or inference, for the sake "of giving the libellant this remedy, and sustaining our "jurisdiction. But we have shown this conclusion is not "a correct inference from the premises, and that *this lien, "being stricti juris, will not be extended by construction.* "It is, moreover, abundantly evident that this contract has "none of the features of a charter-party. A charter-party "is defined to be a contract by which an entire ship, or "some principal part thereof, is let to a merchant for the "conveyance of goods on a determined voyage to one or "more places. (Abbott on Ship., 241.)"

In the case of the Schooner Freeman, 18 Howard, 188, Justice Curtis says: "Under the maritime law of the "United States the vessel is bound to the cargo, and the "cargo to the vessel, for the performance of a contract of "affreightment; but the law creates no lien on a vessel as "a security for the performance of a contract to transport "cargo, until some lawful contract of affreightment is "made, *and a cargo shipped under it.*"

And Justice Davis, in the case of The Lady Franklin, 8 Wall. 328, says: "The attempt made, in the prosecution "of this libel, to charge this vessel for the non-delivery of a "cargo, which she never received, and therefore could not "deliver, because of a false bill of lading, cannot be suc- "cessful, and we are somewhat surprised that the point is "pressed here. * * * The doctrine that the obligation "between ship and cargo is mutual and reciprocal, and does "not attach until the cargo is on board, or in the custody of "the master, has been so often discussed and so long settled "that it would be useless labor to restate it, or the princi- "ples which lie at its foundation. The case of The Schooner "Freeman v. Buckingham, decided by this court, is deci-

"sive of this case. It is true the bill of lading there was "obtained fraudulently, while here it was given by mistake; "but the principle is the same, and the court held in that "case that there could be no lien, notwithstanding the bill "of lading."

And the same court, in the case of The Keokuk, 9 Wall. 517, holds that "the law creates no lien on a vessel as "security for the performance of a contract to transport "a cargo, unless some contract of affreightment has been "made." Justice Davis, on page 519, says: "It is a prin- "ciple of law that the owner of the cargo has a lien on the "vessel for any injury he may sustain by the fault of the "vessel or the master; but the law creates no lien on a "vessel as security for the performance of a contract to "transport a cargo until some lawful contract of affreight- "ment is made, *and the cargo to which it relates has been "delivered to the custody of the master or some one "authorized to receive it.*"

And the same court, in the case of The Delaware, 14 Wall. 602, says: "But it is well-settled law that the own- "ers are not liable, if the party to whom the bill of lading "was given had no goods, or the goods described in the bill "of lading were never put on board or delivered into the "custody of the carrier or his agent."

In the case of The Schooner General Sheridan, 2 Bene- dict, 294, the facts were that the schooner General Sheri- dan was chartered by one Faber for a voyage from one or more of several named places of loading on the west coast of Florida to New York. Faber afterwards filed his libel against the vessel in rem, alleging a breach of the charter, in that the vessel did not, as she was required to do, pro- ceed to any of the ports of loading mentioned in the char-

ter-party, or give notice of her readiness to receive cargo, or take any cargo, but returned to New York without having fulfilled any of the stipulations of the charter-party. He claimed damages for the alleged breach. The claimants excepted to the libel, on the ground that the facts set forth in it did not constitute any lien on the vessel. Upon these facts, Justice Blatchford held that the case of The Pacific, 1 Blatchford, 569, had been overruled by the cases of The Schooner Freeman v. Buckingham, 18 How. 182, and Vandewater v. Mills, 19 How. 82; and (on page 297) said: "The obligations of the vessel to the mer-"chandise to be laden on board, and of the merchan-"dise to be laden on board to the vessel, are mutual and "reciprocal. Under the covenant, the duty of the vessel, "to the performance of which the hypothecation binds "her, is to deliver the cargo that may be put on board at "the time and place stipulated for such delivery. *Any "duty that may be violated by the owner or master, "before the cargo is put on board, is not a duty of the "vessel, or one for the breach of which a lien on the vessel "is created or can be enforced.* So, too, under the cove-"nant, if the cargo is not laden on board, it is not bound "to the vessel, and therefore the *vessel* cannot be in "default, though the *master or owner may be*, for the non-"delivery of the cargo. To hold that the vessel was bound "to the merchandise to be laden on board, when there was "no merchandise laden on board, would be to depart from "the express terms of the covenant, and to destroy the "mutual and reciprocal character of the obligations of "the covenant. * * * The exceptions are allowed, and "the libel is dismissed, with costs."

In Scott v. The Ira Chaffee, 2 Fed. Rep. 401, a libel in rem was filed to recover damages for breach of a contract by the master to carry a boiler from Detroit to Oscoda. The boiler was never actually put on board the propeller, nor delivered to *her master, as master, although he received it on behalf of the schooner Louisa, on which it was laden and carried to Oscoda.* The Louisa was caught in the ice and detained, whereby the arrival of the boiler was delayed. The libellant claimed damages for detention. Justice Brown, now of the United States Supreme Court, on page 407, after reviewing the authorities, says: "From this review of the cases it will be seen that, with "the exception of the dictum in the case of the Williams, "there is no authority for saying that a court of admiralty "has jurisdiction in rem for the breach of a purely execu- "tory contract. There is reason as well as authority for "the proposition. If the owner of a cargo has a privilege "upon the vessel for a breach of his contract, the vessel "would be entitled equally to a lien on the cargo for a "refusal of the owner to put it on board, and it might be "seized upon the dock or anywhere else for the satisfac- "tion of such lien. If the jurisdiction is sustained in this "class of cases, it ought also to include cases of contract "to repair the vessel or supply her with stores, in which "the material-man would be entitled to a lien, though "nothing had been done under the contract."

In the case of The Monte A., 12 Fed. Rep. 331, Justice Brown says: "The action in this case is brought for the "breach of a contract of charter-party wholly executory. "The vessel never entered upon the performance of the "contract or any part of it. In such cases it has been "repeatedly declared by the Supreme Court that no lien

"exists upon the vessel. * * * The considerations in "favor of such a lien, expressed in the cases of The Flash, "Abb. Adm. 67, and The Pacific, 1 Blatchf. 569, must be "deemed overruled by these subsequent decisions. There "being, therefore, no lien upon the vessel, there is no "foundation for a decree in rem against her."

And in the case now under consideration, in an opinion upon exceptions to the original libel (83 Fed. Rep. 222), Judge Hanford holds that a suit in rem is not maintainable for breach of an executory contract to carry a passenger on a particular vessel, where the vessel has never entered on the performance thereof. "*The lien upon "which the right to proceed in rem depends does not "attach until the passenger has placed himself within the "care and under the control of the master.*" And on page 224 he says: "These authorities are conclusive upon the "point that the right to proceed in rem for breach of a "contract of affreightment does not exist unless the cargo, "or a portion of it, has been delivered to the master of the "vessel, or to his authorized agent. The authorities also "hold that ships engaged in carrying passengers on the "high seas stand on the same footing of responsibility, "according to the maritime laws, as those engaged in "carrying merchandise. 1 Am. & Eng. Enc. Law (2d Ed.), "pp. 661, 662. * * * *According to the authorities, it "is not the making of a contract, nor the payment of the "consideration therefor, which renders the vessel liable. "The lien upon which the right to proceed in rem depends "does not attach until the goods or passengers have been "placed within the care and under the control of the "ship's master.*"

In this case, the Eugene had never entered upon the performance of her contract, and neither the libellants nor their baggage or freight had been received on board as passengers or freight, and neither the libellants nor the Eugene had arrived at St. Michael's, the point at which the voyage of the vessel was to begin.

The testimony was taken before a commissioner, and not in open court, and the statement in the decree that the material allegations of the amended libel are true cannot be considered by this court; but this court must itself review the testimony upon these questions. Glendale v. Evich, 81 Fed. Rep. 633.

It is true that the Eugene started for St. Michael's, with the intention, if she arrived there, of there performing the contract under which the Portland & Alaska Trading & Transportation Company had agreed to carry libellants as passengers on said vessel. To reconcile the decision of the district court on the exceptions with its decision on the case, we must conclude that the court decided that the Eugene entered upon the performance of her contract when she started for St. Michael's under tow, with no passengers or baggage aboard her, and uncertain by the terms of her charter whether she would ever arrive at St. Michael's, where her own employment was to begin. Such a sailing, with the intention to perform the contract, is insufficient, however, to sustain a proceeding in rem against the vessel.

As Judge Brown, in the case of The C. E. Conrad, 57 Fed. Rep. 256, says: "I doubt whether merely proceeding "to Rochester with the intention of taking the libellant's "salt, and on arrival there going elsewhere for a different

"cargo, would constitute such an entry *on the perform-*
"*ance of the contract, as would bring the case within the*
"*rule of a partial execution of the charter, sufficient to*
"*sustain a libel in rem for the breach of the contract.*"

Libellants maintained that they had contracted for a continuous voyage which had commenced, and claimed in the libel that the Eugene had started from Seattle upon the voyage in tow of the Bristol. Such, however, is not the case, as is shown by the testimony. Libellants paid $300 to C. W. Gould, acting as joint agent for Davidge & Co., charterers of the Bristol, and the Portland & Alaska Trading & Transportation Company, and received therefor a local ticket on a third vessel from Seattle to Victoria, an order on Davidge & Co., at Victoria, for a ticket on the Bristol to St. Michael's, which they exchanged at Victoria for the ticket, and a ticket good for one passage from St. Michael's to Dawson City via the Eugene, signed by E. B. McFarland as general manager.

Libellants have their action in personam against the Portland & Alaska Trading & Transportation Company for any failure on its part to land libellants in Dawson City as agreed; *but the liability of the Eugene is limited to breaches of its particular part of the contract.* For example, had the Eugene arrived at St. Michael's and there received on board the libellants as passengers, or part of their outfit as freight, and then refused to proceed, or committed other breaches of its then existing obligation, an action in rem would lie against the vessel. The Eugene did not start from Seattle in tow of the Bristol; she proceeded from Port Townsend to another port, Victoria. Libellants proceeded to Victoria on the City of Kingston, and there embarked on the Bristol, which latter vessel,

outside of Victoria, fastened a tow-line to the Eugene. The tow-line could not make the Bristol and the Eugene one vessel, so as to make the passengers on the Bristol passengers on the Eugene.

The J. P. Donaldson, 167 U. S. Sup. Ct. Rep. 599, is a valuable authority upon the relations between tug and tow. In that case, the propeller J. P. Donaldson was engaged in the towage of two barges laden with grain, and for its services as a tug was to receive a proportion of the freight money to be earned by the barges. A storm coming up, the tug, in order to save herself, cut loose from the barges, which were lost, and the owners of the cargo on the barges libelled the tug to recover a general average contribution from her, claiming that the tug and tow were bound up into a single maritime adventure. The court, however, held that such a contention was unsound, and dismissed the libel. On page 602 the court say:

"While the tug is performing her contract of towing the "barges, they may, indeed, be regarded as part of herself, "in the sense that her master is bound to use due care to "provide for their safety as well as her own, and to avoid "collision, either of them or of herself, with other vessels. "* * * * But the barges in tow are by no means put "under the control of the master of the tug to the same "extent as the *tug herself, and cargo, if any, on board of "her.* And on page 604: *It is solely for the purpose "of performing the contract of towage that the vessels "towed are put under the control and management of the "master of the tug.* In all other respects, and for all other "purposes, they remain under the control of their respect-"ive masters; and, in case of unforeseen emergency, it is "upon the master of each that the duty rests of determin-

"ing what shall be done for the safety of his vessel and of "her cargo. * * * *The fact that the sum to be paid "to the tug for towing each barge was measured by a "certain proportion of the freight to be earned by that "barge is immaterial. It did not create a partnership "between the owners of the tug and the owners of the "barges.* Meehan v. Valentine, 145 U. S. 611, 12 Sup. "Ct. 972. *Nor could it have the effect of combining the "tug and the barges into a single maritime adventure, "within the scope of the law of general average.* For the "reasons above stated, this court concurs in the opinion "expressed in this case by Mr. Justice Brown, when dis- "trict judge, that 'the law of general average is confined "'to those cases wherein a voluntary sacrifice is made of "'some portion of the ship or cargo for the benefit of the "'residue, and that it has no application to the contract "'of towage.' 19 Fed. 272."

The position of the Eugene, as an independent vessel, is far stronger than the position of the barges with reference to the Donaldson. The Eugene proceeded by her own power from Port Townsend to Victoria, and for a large portion of the voyage from Victoria to the point at which the voyage was abandoned proceeded independently of the Bristol. Under the contract entered into between the Portland & Alaska Trading & Transportation Company and Davidge & Co. (Transcript, p. ; Record, p. 196, the Eugene was to furnish her own motive power, and the Bristol was to act as her convoy, and receive a stipulated sum per day for her services as such. The use of the Bristol for the purpose of a convoy for the Eugene was an incident only, and was for the purpose of better enabling the Eugene to arrive at St. Michael's. The Eugene might equally as

well have employed some other sea-going tug as convoy; and, as Capt. Jones testifies, such was the original intention.

It was contended by libellants in the District Court that the delivery of their outfit to the wharfinger at the Yesler dock at Seattle was such a delivery to the Eugene as to bind the vessel in rem. But the Eugene never was in Seattle, nor was her master there; and she was not to receive the outfit as freight or baggage *until she arrived at St. Michaels, 2000 miles distant from Seattle.* The delivery was made neither to the master of the vessel nor to any one authorized by the master to receive it, on behalf of the vessel, in such a way as to bind the vessel; nor was any bill of lading or receipt given in the name or in behalf of the Eugene. The carriage of the outfit was to be on the City of Kingston to Victoria, on the Bristol from Victoria to St. Michael's, and on the Eugene from St. Michael's to Dawson City; and the delivery was made at the landing place of the City of Kingston in Seattle, to the man in charge of the dock as representative of the City of Kingston. *Such a delivery might be sufficient to sustain an action in personam against the Portland & Alaska Trading & Transportation Company, but not an action in rem against the Eugene.*

In the case of Ammon v. The Vigilancia, 58 Fed. Rep. 698, Justice Brown holds that there can be no delivery to the ship, in the maritime sense, either of supplies or cargo, so as to bind her in rem, until the *goods are either actually put on board the ship, or else brought within the immediate presence or control of her officers.* In that case, the ship lay at Jersey City, and the goods were delivered to a truckman in New York, a mile or so away; and it was

contended that delivery to the truckman was a delivery to the ship. The court, on page 700, says: "Had the "goods in question been lost while in transit from Jersey "City to Roberts's Stores, where the ship lay, the steam- "ship company might possibly have been personally liable "for the goods; but plainly no lien for them could have "arisen against the ship, *because they would never have "come to the benefit of the ship.* * * * No lien, there- "fore, arose when the goods were delivered to the truck- "man in Jersey City, *since the ship had not received "the goods, and might never receive them. Something "more had to be done, viz., to deliver them to the ship.*"

The Caroline Miller, 53 Fed. Rep. 137, is a case directly in support of our position. A libel was filed against the Caroline Miller to recover the value of eleven bales of cotton alleged as shipped on board said vessel at Brunswick, Georgia. The cotton was delivered to an agent of the New York & Brunswick Line at Brunswick, Georgia, who receipted for it to be transported by the Caroline Miller from Brunswick to New York. The eleven bales was the undelivered portion of the lot never actually received on board the steamer. The court, on page 137, says: "Upon "the above facts, the steamship is not liable in rem for the "missing bales, because they were never put on board of "the steamer, nor did they ever come into the *possession "of the master, or under his control.*" And on page 138: "By the charter of the ship, the owners doubtless author- "ized the master to bind the ship for such goods as the "charterers might deliver to him for transportation, "whether actually put on board or upon the dock, and "under the master's control for that purpose. But here "the *master did not sign any bill of lading, or undertake*

"*to bind the ship, and the missing cotton never came*
"*under his control.* The agent of the New York & Bruns-
" wick Steamship Line who signed this shipping document
" was not the agent of the shipowner, nor of the master.
"*The delivery of goods to that agent was, therefore,*
"*neither a delivery to the master, nor a delivery to the*
"*ship.*" *In the case of the Eugene the outfit of libellants came neither into possession of her master nor under his control.*

In the case of The Guiding Star, 53 Fed. Rep. 936, the court held that no lien exists upon a vessel in respect to goods for which her agents have issued a bill of lading, but which are destroyed while in custody of the keeper of the landing before being received on board or coming under the control of the master. The case is an exhaustive one, and on page 943 distinguishes the case of Bulkly v. Cotton Co., 24 How. 386, cited by libellants in the District Court, in which case it was held that where a vessel lay in the port of Mobile, and her master had agreed to carry cotton from that port to Boston, delivery to a lighter, the master signing bills of lading therefor, was a delivery to the vessel; the court holding that the vessel herself was bound from the time of the delivery by the shipper *and acceptance* by the master, and that the delivery to the lighterman was a delivery to the master. The case of Bulkly v. Cotton Company has no application to the case at bar, because in the case cited the master signed the bills of lading and agreed to transport the cotton in that manner, whereas, in the case at bar, the master had never receipted for the goods.

We call attention to what the court says in the case of the Vigilancia, already cited: "If, on the other hand,

"the libellants' evidence be deemed sufficient to prove "that the title to the property passed in Jersey City to "the steamship company, and that the delivery to the "truckmen there was, in law, a delivery to that company; "still, that would not amount to a delivery, or to a fur- "nishing of supplies, to the ship in Jersey City, *but only* "*to a common-law delivery to the company, sufficient to* "*bind the company in personam: which is a very different* "*thing from a delivery to the ship, or binding the ship* "*in rem.* The ship was not in Jersey City, but within a "different jurisdiction, a mile or two away."

It is true that in this case one of the libellants attempted to show that he had seen a portion of his outfit on board the Eugene, and that it was placed by the Bristol on board the Eugene for the purpose of lightening the Bristol. This statement is flatly disproved by libellant's witness Johnson, the purser on the Bristol, and the representative of Davidge & Co., who, on page 267 (Transcript, p. ; Record, p.224), testifies in substance that the Eugene came across from Port Townsend herself, and put on board the Bristol the stores and outfit of the crew of the Eugene; *that no supplies or outfits were transferred from the Bristol to the Eugene*, and that there was no necessity for lightening the Bristol by any such transfer.

Capt. Geer (Transcript, p. ; Record, p.236) testifies that the stores and outfit of the crew of the Eugene were transferred from the Eugene to the Bristol at Comox; that he never saw libellants until the boat was libelled at Seattle, and that none of the outfits of libellants or any of the other passengers of the Bristol were ever on the Eugene.

Capt. Lewis, master of the Eugene (Transcript, p. 383; Record, p.301), says that neither the libellants nor their

outfits were ever on the Eugene, and that he, as master of the Eugene, never had any dealings with libellants.

Libellants must stand upon their own contract. They are not privy to the contract between the owner of the Eugene and the Portland & Alaska Transportation Company. Their contract is in terms for transportation from St. Michael's to Dawson City.

The power of the charterers to bind the Eugene is governed by the terms of the charter-party. That instrument shows that it was always contemplated that the Eugene might never reach St. Michael's, and all contracts under the charter-party were conditional and executory, and execution of such contracts was to commence only at St. Michael's.

III.

The circumstances under which the Eugene abandoned the voyage were such as to discharge the vessel from any liability which she might otherwise have incurred. She was a light-draught river steamboat, which had been put in as reasonably safe condition as possible to stand the sea trip, having had a truss put in and the decks built up and enclosed. As Capt. Geer says, on page 287 of the transcript: "The trip was in the nature of an experi-"ment, and we could not tell whether the boat could get "through or not."

Capt. Lewis, the master of the Eugene (Transcript, p. ; Record, p. 300), says: "She encountered a strong gale "and had to turn back. Her behavior had been good for "a river boat at sea. She had gone from the Columbia "river to Port Townsend safely, and had behaved all right "until the storm was encountered in open sea north of

"Queen Charlotte's Sound." Capt. Geer also testifies as to the condition of the weather and the sea when the Eugene put back.

There had been no absolute undertaking on the part of the Portland & Alaska Trading & Transportation Company that they would land libellants in Dawson City. Gould, from whom libellants purchased their tickets, testifies, in substance (Transcript, p. 346; Record, p279) that McGuire said he would not guarantee that they would get through, and that he himself never made any guarantee that they would.

We admit that the storm encountered by the Eugene was not a hurricane or a tornado; but it was a storm for a vessel such as the Eugene, a light-draught river boat, known as such to libellants and to all the community. And it was commonly known and considered, too, that the venture, at best, was only an experiment.

We contend that libellants and the Portland Trading & Transportation Company had contracted only for a bona fide attempt to put the libellants through to Dawson City; that the attempt was made in good faith and with reasonable precautions; and that as it failed by sea peril, the loss must fall upon libellants.

IV.

As we have argued under the first subdivision, the contract was entered into by libellants with the Portland & Alaska Trading & Transportation Company, in reliance upon the credit and responsibility of that corporation. Libellants themselves have testified that they made inquiries and satisfied themselves as to the solvency and responsibility of the corporation. For any breach of the

contract, their remedy therefore lies against the Portland & Alaska Trading & Transportation Company, and not against the Eugene.

But they have not shown any breach of contract which entitles them to recover even as against the Portland & Alaska Trading & Transportation Company. Gould, from whom they purchased their tickets, stated that he made no guarantees that the boat would get through; and that McGuire had said that he would not guarantee that they would get through (Transcript, p. 346; Record, p.). It is true that "dodgers" were circulated as to the time of the departure of the expedition and the probable date of the departure of the Eugene from St. Michael's and her arrival at Dawson. There is nothing to show that libellants relied upon or contracted with reference to these handbills, or *that their contract was other than evidenced by the tickets which they received in exchange for their money*. Moreover, the handbills were circulated without knowledge or authority of the owner of the Eugene (Jones, Transcript, p. ; Record, p. 257).

V.

Damages in the sum of $800 each were awarded to libellants by the District Court. They each paid $300 for a ticket; of which sum, they state under oath, in their original libel, that $200 was to go to the Eugene and $100 to the Bristol. Libellant Jacobi (Transcript, p. 153; Record, p. 132) says that his loss on outfit was about $100. Libellant Ruff (Transcript, p. ; Record, p. 76) says that the loss on his outfit was between $40 and $50. The balance of the award could only have been for loss of time or expected profits. They were gone on the expe-

dition, all told, only eight or nine days (Ruff, Transcript, p. 77). Jacobi was a cigar-maker, who worked by the piece, and had no regular and definite earning capacity; and Ruff was a blacksmith, earning on an average, he states, $2.90 per day (Transcript, p. ; Record, p. 77). There is no evidence that either of these libellants would have obtained any employment or would have earned anything at their respective trades had they succeeded in getting through.

Such claims for loss of expected earnings or profits are too remote and speculative to furnish any basis for a recovery.

Howard v. Stillwell Co., 11 Sup. Ct. Rep. 500.

B. C. Mills Co. v. Nettleship, L. R., 3 C. P. Cases, 499.

Blanchard v. Ely, 21 Wend. 342.

Libellants were absent on this expedition, from the time they left Seattle until they returned, only eight or nine days; and their loss of time, in any event, should be measured by this delay. But it seems to us that the only damages which they could properly recover from the Eugene, *had she begun to carry them and then refused to proceed, would have been their passage-money, $200, and no more.*

VI.

All the reasons which we have urged as justifying a reversal of the decree rendered in favor of Jacobi and Ruff would apply with equal force to any libel of intervention on behalf of Cary, Lyons and Knight, had such libel of intervention been filed. The District Court, misled by proctors for libellants into the belief that a libel of intervention had been filed, has in this case rendered a decree against the Eugene in favor of Cary, Lyons and

Knight, each in the sum of $800, *when no such libel of intervention was in fact ever filed, and when the court had nothing before it upon which to base such decree.*

The decree, in so far as it awards any damages to Cary, Lyons and Knight, is a nullity, no suit having been instituted in their behalf against the Eugene.

Windsor v. McVeigh, 93 U. S. 274, 280.

In conclusion, and by way of summary, we urge the following considerations:

The maritime lien is stricti juris, and cannot be extended by implication. The lien for breach of charter-party arises only after performance of the charter-party has been begun by the ship; that for supplies, only after the furnishing of the supplies to the ship; and that for breach of contract for the carriage of freight or passengers, only after the passengers have gone on board the vessel or the freight has been delivered on board the vessel or placed within the immediate control or custody of the master. While, for breach of a contract not actually undertaken, the injured party has his action in personam against the person with whom he had contracted, *anything short of actual performance on the part of the vessel is insufficient to create a maritime lien upon the vessel.*

In this case, libellants contracted, not with the Eugene, but with the Portland & Alaska Trading & Transportation Company; and upon its credit, and not that of the boat—which was not then at Seattle, where the contract was entered into. Under these circumstances, they dealt not with the boat but with the Portland & Alaska Trading & Transportation Company; and their rights against the boat must be measured by the power to bind the boat

given by its owners to the Portland & Alaska Trading & Transportation Company. And as this corporation had no right to contract for the carriage of freight or passengers on the Eugene, except upon the Yukon river, and then only conditioned upon the arrival of the boat at St. Michael's, the boat is not bound by any contracts which may have been made by the corporation in excess of the powers granted it under the contracts.

The voyage of the Eugene, for which libellants contracted with the Portland & Alaska Trading & Transportation Company, was to begin at St. Michael's, not at Seattle. Libellants have stated under oath in Article III. or their original libel (Record, p. 4), that they engaged passage for themselves and baggage from Seattle to Dawson City, and purchased from the manager and agent of the Bristol and Eugene two tickets for their passage, one for the conveyance of themselves and baggage by the Bristol from Seattle to St. Michael's, and the other for the conveyance of themselves and baggage from St. Michael's to Dawson City, the second ticket reading:

"Portland & Alaska Trading & Transportation Co.

"Good for one passage from St. Michael's, Alaska, to
"Dawson City, N. W. T., via S. S. Eugene.
"Name of passenger .....

"E. B. McFARLAND,
"General Manager."

And these sworn admissions must bind libellants.

As to the three vessels upon which libellants were to be conveyed, each was to perform an independent voyage. That of the City of Kingston was to begin at Seattle and end at Victoria; that of the Bristol was to begin at Vic-

toria and end at St. Michael's; and that of the Eugene was to begin at St. Michael's and end at Dawson City.

A maritime lien could only arise as to the vessel Eugene by reason of breach of a contract undertaken at St. Michael's after there receiving on board libellants and their outfits. Any contract on the part of the Portland & Alaska Trading & Transportation Company for matters occurring prior to the arrival of the Eugene at St. Michael's, and there receiving on board the passengers and freight, was executory only and insufficient to bind the vessel. For any such breach of contract, libellants have their action in personam against the Portland & Alaska Trading & Transportation Company; but they have no action in rem against the Eugene.

The tow-line passed from the Bristol to the Eugene outside of Victoria did not make the Bristol and Eugene one vessel so as to make the embarking of libellants on the Bristol an embarking on the Eugene. The voyage of the Eugene, within the terms either of the charter-party or the ticket, had not begun. She was herself being conveyed to her point of departure. The delivery of the outfits of the libellants to the wharfinger at the Yesler dock at Seattle, where these outfits were placed on board the City of Kingston, was not a delivery to the Eugene, inasmuch as it was not a delivery to the master of the Eugene or to any one under his control or subject to his direction. Nothing short of the actual receipt of the outfit by the master of the Eugene, or some one signing the receipt by his direction and on behalf of the vessel, would be a delivery to the ship sufficient to sustain an action in rem against her; although it might be a common-law delivery suf-

ficient to sustain an action in personam against the Portland & Alaska Trading & Transportation Company.

For all of the above reasons, as well as upon the ground of excessive damages, the decree of the District Court should be reversed, with instructions to that court to dismiss the libel. The decree, in so far as it gives any award to Cary, Lyons and Knight, is absolutely void, for the reason that no libel of intervention was ever filed in the District Court, and that court had consequently no jurisdiction to render such decree.

Respectfully submitted.

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Proctors for Appellant.